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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

KOU CHA,

Defendant and Appellant.

F075431

(Fresno Super. Ct. Nos. CF02900756
& CF03900158)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Denise Whitehead, Judge.

Elisa A. Brandes, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and Angelo S. Edralin, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Poochigian, J. and Detjen, J.

INTRODUCTION

Appellant/defendant Kou Cha was convicted of four counts of assault with a semiautomatic firearm (Pen. Code, § 245, subd. (b)),¹ with enhancements for personally using a firearm in the commission of the offense (§ 12022.5, subd. (a)(1)) and committing the offenses for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). He was initially sentenced in 2003. In 2014, his initial sentence was vacated because he filed a successful petition for writ of habeas corpus, and he was resentenced. Defendant filed an appeal challenging the court's calculation of his sentence at the 2014 hearing. In 2016, we found the court committed an error in calculating his aggregate term using the enhancements, vacated the sentence, and remanded the matter. In 2017, the court conducted another sentencing hearing and the parties have not challenged the court's calculation of his aggregate term.

In this appeal from the 2017 resentencing hearing, defendant contends the court failed to orally impose restitution and parole revocation fines, and the abstract improperly states that fines were imposed. Defendant argues that the People did not object to the court's failure to orally impose these two fines and have thus forfeited any claim that the matter should be remanded for correction of the record. In the alternative, defendant contends that if the matter is so remanded, he should be able to raise an ability to pay objection to the amount of the fines. Defendant also argues the court improperly calculated his credits.

We will remand the matter for the court to address the restitution and parole revocation fines and correct the calculation of defendant's credits, and otherwise affirm.

¹ All further statutory citations are to the Penal Code unless otherwise indicated.

FACTS²

“On December 26, 2002, nine-year-old M.V. (count II), Foua Moua (count IV), 88-year-old Chau Vue (count VI), and Chai Thao (count VIII) were leaving the Hmong New Year festivities at the Fresno Fairgrounds when they were shot.

“There were witnesses who reported the gunman was a man wearing a red sweater with white stripes. One witness identified defendant as the gunman and said he was firing a semiautomatic handgun. Defendant and another male were seen running through the parking lot. Defendant was apprehended as he was leaving the fairgrounds. He was wearing a red sweater with white stripes.

“The police determined that cartridge cases and unspent cartridges found at the scene were from a semiautomatic weapon. The prosecution introduced evidence that defendant was a member of the Oriental Ruthless Boys criminal street gang and the crimes were committed for the benefit of the gang.”

Defendant’s Convictions

On June 19, 2003, after a jury trial, defendant was convicted as charged of counts 2, 4, 6, and 8, assault with a semiautomatic firearm on the four victims (§ 245, subd. (b)). As to each count, the jury found true the allegations that he personally used a firearm in the commission of the offense and committed the offense for the benefit of a criminal street gang.

Defendant was also convicted of count 9, felon in possession of a firearm (§ 12021, subd. (a)(1)) with a gang enhancement.

The court found defendant violated probation in an unrelated case for felony receiving stolen property.

² On December 11, 2017, this court took judicial notice of the record on appeal in *People v. Kou Cha* (November 15, 2016, F069552 [nonpub. opn.]).

Defendant's First Sentencing Hearing in 2003

On August 14, 2003, defendant was sentenced to an aggregate term of 49 years. The court calculated the aggregate term based on the substantive charges, the personal use enhancements, and the gang enhancements.

The court ordered defendant to pay victim restitution of \$1,210 pursuant to section 1202.4, subdivision (f), with the amount payable to the restitution fund. The victim restitution order was based on a memo attached to the probation report, prepared by the County of Fresno's restitution coordinator for the Victim Compensation and Government Claims Board. It stated the child victim (count 2) had requested and received assistance from the board for payment of mental health treatment expenses of \$1,210. The county requested a victim restitution order for that amount, and for it to be payable to the restitution fund, plus an amount to be determined for possible future expenses, pursuant to section 1202.4, subdivision (f).

The court separately ordered defendant to pay a restitution fine of \$9,800 pursuant to section 1202.4, subdivision (b), and imposed and stayed the parole revocation fine of \$9,800 under section 1202.45. The fines were the same amounts recommended in the probation report.

Defendant did not object to the court's imposition of the fines.

Defendant's First Appeal

This court filed the nonpublished opinion in *People v. Kou Cha* (May 12, 2005, F043761/F043816), which modified defendant's registration requirements and otherwise affirmed defendant's convictions and sentence. Defendant did not raise any issues regarding the restitution fines in his first appeal.

Defendant's Habeas Petition

On November 4, 2013, defendant filed a petition for writ of habeas corpus in the Superior Court of Fresno County and asserted his sentence was unauthorized based on *People v. Rodriguez* (2009) 47 Cal.4th 501, which held that when a defendant's use of a

firearm elevates the underlying offense to a “violent” felony, the defendant cannot be sentenced using both the personal use and gang enhancements under section 186.22, subdivision (b)(1)(C). The People conceded the sentencing error.

On March 21, 2014, the superior court granted defendant’s petition on the *Rodriguez* sentencing issue, vacated his sentence, and ordered a new sentencing hearing. Thereafter, defendant filed a motion about how his aggregate sentence should be calculated. He did not raise any issues or objections about the court’s orders for the restitution and parole revocation fines.

The 2014 Resentencing Hearing

On June 6, 2014, the superior court convened a new sentencing hearing pursuant to the granting of the habeas petition. The court recalled defendant’s sentence that was imposed in 2003.

The court imposed an aggregate term of 36 years, based on terms for the substantive offenses, the personal use enhancements, and the gang enhancements.

The court orally imposed a restitution fine of \$1,200 pursuant to section 1202.4 and imposed and stayed a parole revocation fine of \$1,200 under section 1202.45.

The court also addressed victim restitution: “And pursuant to Penal Code section 1202.4(f) defendant is to continue to make restitution to the victims.” The prosecutor asked the court to reserve additional victim restitution and the court agreed.³

The court further imposed a \$200 court operations assessment fee under section 1465.8 and a \$150 criminal convictions assessment fee under Government Code section 70373.

Defendant did not object to any of the fines, fees, or assessments.

³ The minute order for the 2014 hearing states the court reserved the matter of victim restitution. The victim restitution order is not in the abstract of judgment for the 2014 hearing.

Defendant's Second Appeal

Both defendant and the People filed notices of appeal from the June 6, 2014, resentencing hearing. Defendant did not raise any issues in his second appeal about the court's imposition of the restitution and parole revocation fines at the 2014 sentencing hearing. We requested additional briefing on the *Rodriguez* sentencing issue.

On November 15, 2016, this court filed the unpublished opinion in defendant's second appeal, *People v. Kou Cha, supra*, F069552.

We agreed with defendant's appellate contention that the superior court improperly ordered him to pay the \$200 courtroom security fee (§ 1465.8), and the \$150 criminal conviction assessment fee (Gov. Code, § 70373), because the statutory authorities for both fees were enacted after he committed the offenses in this case. While defendant did not object to these orders at the 2014 sentencing hearing, we found he did not forfeit the issue because the court had imposed an unauthorized sentence.

We rejected the People's appellate claim that defendant should have received elevated terms for the gang enhancements.

Instead, we found that defendant was improperly sentenced to 36 years based on the court's reliance on both the gang and personal use enhancements to calculate defendant's aggregate term, as stated in *Rodriguez* and *People v. Le* (2015) 61 Cal.4th 416. Even though defendant did not object to his sentence, we again found he did not forfeit the issue because he received a legally unauthorized term, he was entitled to another sentencing hearing, and the matter must be remanded for another sentencing hearing.

In our disposition, we affirmed defendant's convictions and the enhancements that were found true at his 2003 trial. We ordered the \$200 courtroom security fee (§ 1465.8); and the \$150 criminal conviction assessment fee (Gov. Code, § 70373) stricken.

Our disposition vacated defendant's sentence and remanded the matter for another sentencing hearing consistent with *Rodriguez* and *Le*.

Defendant's 2017 Resentencing Hearing

On March 30, 2017, the superior court held the resentencing hearing on remand, which is the subject of this appeal.

Defense counsel advised the court that defendant wanted to make a statement “on a fee or fine issue.” The court asked counsel if defendant was raising a fine issue “other than the one that was remanded to the court.” Counsel said defendant objected to the court’s orders at the 2003 sentencing hearing because it failed to make “a determination for [his] ability to pay *a \$10,000 restitution fine*, and he is asking the court to make that determination, or in the alternative, if that is not granted, he wants a freeze on his abstract of judgment so that he can make payments on that fine when he is paroled....”⁴ (Italics added.)

The prosecutor replied that the appellate opinion properly held that certain fees had to be stricken on remand. The prosecutor argued any issues about the restitution fines were not properly before the superior court, defendant had likely waived any objections to the restitution fines, and the matter had been remanded only to address the sentencing issues regarding the calculation of his aggregate term based on the gang and personal use enhancements.

The court stated it did not have jurisdiction to address defendant’s objections to the restitution fines:

“Starting with [defendant’s] concern regarding the imposition of the restitution fine, and also the trial court’s alleged failure to make a determination of his ability to pay *the \$10,000 fine* and/or the request to

⁴ Defense counsel’s reference to the “\$10,000” restitution fine is apparently to the court’s orders at defendant’s first sentencing hearing in 2003, when it imposed a restitution fine of \$9,800 pursuant to section 1202.4 and imposed and stayed the same amount under section 1202.45. The court and the parties continued to discuss defendant’s ability to pay objections at the 2017 hearing without realizing that when the court recalculated and reduced defendant’s aggregate sentence at the 2014 sentencing hearing, it also reduced the restitution and parole revocation fines to \$1,200.

freeze the abstract of judgment, *those issues are not properly before the court today, and those issues were not raised in either appeal in this case, so I don't believe the court has jurisdiction to hear those matters, as the appeal is final in this matter, and those issues were not raised on appeal*, so I'm going to deny them today without prejudice to filing a formal written motion establishing the court has jurisdiction once remitter issues on the direct appeal to address those issues and/or any other avenues the defense may pursue in attempting to properly bring those issues before the court.” (Italics added.)

The court imposed an aggregate term of 29 years, based on the substantive counts, and the gang and personal use enhancements.

The court ordered the courtroom security fee and criminal conviction assessment fee stricken, as ordered by this court.

The court orally awarded 232 actual days of presentence credits and 34 days of credits under section 2933.1, and 4,977 days of actual postsentence credits, for a total of 5,243 days. However, the minute order is silent on credits, and the abstract of judgment states different amounts, leading to a total of 4,215 days of credits.

The court did not make any further statements about the restitution fine or refer to the previous victim restitution order. There are no references to victim restitution or fines in the minute order.

The abstract of judgment states that defendant was ordered to pay a restitution fine of \$1,200 under section 1202.4, and that a \$1,200 parole revocation fine was imposed and stayed under section 1202.45. These amounts are consistent with the court's orders that were imposed at the 2014 sentencing hearing.

DISCUSSION

I. The Matter Must be Remanded

Defendant contends that when this court vacated his sentence and remanded the matter, it also vacated the previously imposed restitution and parole revocation fines. Defendant further contends that since the court failed to orally impose any fines at the

2017 resentencing hearing, the notation in the abstract of judgment restating the previously-imposed fines was invalid and must be stricken.

Defendant also argues that the matter cannot be remanded again for the court to reconsider whether to impose any restitution and parole revocation fines or clarify the order in the abstract, since the People failed to object at the 2017 sentencing hearing.

A. *Rosas*

Defendant's assertions about the record and the resentencing hearing are similar to those addressed in *People v. Rosas* (2010) 191 Cal.App.4th 107 (*Rosas*). In that case, the defendant was convicted of six felony counts and sentenced to a lengthy prison term. The superior court imposed a restitution fine of \$10,000 under section 1202.4 and imposed and stayed a parole revocation fine of \$10,000 under section 1202.45. In his first appeal, the appellate court affirmed the defendant's convictions but found multiple sentencing errors based on how his prison term was calculated. The defendant did not raise any issues, and the appellate court did not address the restitution and parole revocation fines in his first appeal. The appellate court's disposition affirmed the defendant's convictions and remanded the matter with directions to “ ‘set aside the sentence and to resentence [the defendant] in accordance with the views expressed in this opinion.’ ” (*Id.* at pp. 109–110, 112.)

On remand after the first appeal in *Rosas*, the superior court conducted another sentencing hearing and recalculated the defendant's prison sentence. Defense counsel asked the court to reconsider the restitution and parole revocation fines. The court agreed and orally reduced the defendant's restitution fine to \$5,000 under section 1202.4 and imposed and stayed the parole revocation fine of \$5,000 under section 1202.45. However, the abstract of judgment still retained both original \$10,000 fines imposed at the first sentencing hearing. (*Rosas, supra*, 191 Cal.App.4th at pp. 110–111, 112, 113.)

In his second appeal, *Rosas* addressed the defendant's argument that the abstract of judgment had to be corrected to show that the superior court reduced both fines to

\$5,000. The People asserted the superior court lacked jurisdiction to reduce the fines at the resentencing hearing because issue of the fines had never been raised or addressed in the first appeal. (*Rosas, supra*, 191 Cal.App.4th at p. 114.)

Rosas held that when the defendant's sentence was vacated in the first appeal, "the matter of the restitution and parole revocation fines [was] most assuredly not severable from the sentencing issues that were sent back to the trial court upon the first appeal." (*Rosas, supra*, 191 Cal.App.4th at p. 117.) " '[W]hen a defendant is sentenced consecutively for multiple convictions, whether in the same proceeding or in different proceedings, the judgment or aggregate determinate term is to be viewed as interlocking pieces consisting of a principal term and one or more subordinate terms.' [Citation.] ¶¶ As presenting an interlocking whole, then, sentencing claims would normally fall under the established rule of appellate procedure that even partial appeals from nonseverable judgments allow a court the jurisdiction to review the entire judgment. [Citation.]" (*Ibid.*)

Rosas rejected the People's argument that the superior court lacked jurisdiction to modify the restitution and parole revocation fines at the resentencing hearing. *Rosas* held that "because of the interlocking quality of the sentencing law, the first appeal had been effectively nonseverable," and the restitution and parole revocation fines were not severable from the prison sentence that was vacated in the first appeal, even though the fines were not addressed in the first appeal. (*Rosas, supra*, 191 Cal.App.4th at pp. 119–120.)

Rosas thus concluded that when the appellate court vacated the entirety of the defendant's sentence in his first appeal, the restitution and parole revocation fines were also vacated, and the superior court had jurisdiction to reconsider those fines on remand from the first appeal. *Rosas* further held the superior court did not abuse its discretion when it reduced both fines since "[t]he length of the sentence, which does bear on the fine[s], was still in flux at the time of the resentencing hearing." *Rosas* ordered the

abstract corrected to reflect the \$5,000 fines, consistent with the court's oral pronouncement at the resentencing hearing. (*Rosas*, *supra*, 191 Cal.App.4th at p. 121.)

B. Analysis

In this case, we vacated defendant's entire sentence in his second appeal in 2016 and remanded the matter for another sentencing hearing for the superior court to recalculate defendant's aggregate sentence, applying the personal use and gang enhancements as explained in *Rodriguez* and *Le*. We also ordered the fees imposed under section 1465.8 and Government Code section 70373 stricken because they were unauthorized. Defendant did not raise any issues about the restitution and the parole revocation fines, and this court's opinion did not address those two fines in any way.

As in *Rosas*, however, this court's disposition vacated the entirety of defendant's sentence, including the fines that were imposed at the 2017 resentencing hearing, and vested the superior court with discretion to address defendant's objections to the restitution and parole revocation fines. At the 2017 resentencing hearing on remand, defendant objected to the previously imposed fines, and asked the court to reconsider those amounts and whether he had the ability to pay those fines. In the course of that discussion, the court and the parties erroneously discussed the \$10,000 restitution and parole revocation fines imposed at defendant's first sentencing hearing in 2003 and did not realize that both fines had been reduced to \$1,500 at defendant's second sentencing hearing in 2014.

Nevertheless, the court declined to address defendant's objections to those two fines at the 2017 resentencing hearing. It stated that it did not have any jurisdiction to reconsider the previously imposed restitution and parole revocation fines, based on the mistaken premise that only defendant's actual prison sentence had been vacated and the remand was limited to recalculating his aggregate term. As in *Rosas*, however, this court vacated the entirety of defendant's sentence and the superior court had jurisdiction to reconsider and reimpose different restitution and parole revocation fines at the 2017

resentencing hearing, and to also consider defendant's objections to the fines. (*Rosas, supra*, 191 Cal.App.4th at pp. 120–122.)

Defendant argues that since the superior court failed to orally pronounce any restitution or parole revocation fines at the 2017 resentencing hearing, then the order for the \$1,500 fines in the abstract must be stricken, even though consistent with the fines imposed at the 2014 hearing, and the matter cannot be remanded for further proceedings since the People failed to object at the resentencing hearing to the court's error.

We reject defendant's premise that the matter cannot be remanded. It is well-settled that the trial court must act with the full knowledge of the scope of its sentencing discretion. (*People v. Fuhrman* (1997) 16 Cal.4th 930, 944.) "[W]here the record *affirmatively* discloses that the trial court *misunderstood* the scope of its discretion, remand to the trial court is required to permit that court to impose sentence with full awareness of its discretion [Citation.]" (*Ibid.*)

It is also well-settled that the court has a mandatory duty to impose a restitution fine "unless it finds compelling and extraordinary reasons for not doing so and states those reasons on the record." (§ 1202.4, subd. (b).) At the 2017 resentencing hearing, the court's response to defendant's request to address his ability to pay the restitution and parole revocation fines shows that it mistakenly believed this court's remand was limited to recalculating defendant's aggregate prison sentence. The court acknowledged it had to strike the fees improperly imposed as ordered by this court in the second appeal, but further stated it did not have jurisdiction to address or reconsider any issues regarding the restitution and parole revocation fines.

There is no indication the court failed to orally pronounce the restitution and parole revocation fines because it found "compelling and extraordinary reasons" not to impose those fines in this case. (§ 1202.4, subd. (b).) Instead, the court's express statements show that it misunderstood the scope of its discretion, and the matter must be

remanded to fully address the restitution and parole revocation fines and ensure the abstract of judgment is consistent with the court's oral pronouncement of those fines.

Since the matter is being remanded for correction of the abstract of judgment, the court should also restate defendant's aggregate prison term that it imposed at the 2017 resentencing hearing, the victim restitution order previously imposed in 2003 and reaffirmed in 2014, and that further victim restitution has been reserved.

II. Calculation of Credits

Defendant contends, and the People agree, that the abstract of judgment does not reflect the court's oral award of custody credits at the 2017 resentencing hearing. The People further state the abstract of judgment is not clear in differentiating between defendant's pre and postsentence credits.

Since the matter is being remanded, the court is directed to recalculate defendant's credits and correct the abstract of judgment accordingly.

DISPOSITION

Defendant's convictions and the jury's true findings on the enhancements are affirmed.

Defendant's aggregate prison sentence imposed at the 2017 resentencing hearing, and the trial court's orders striking the fees imposed under section 1465.8 and Government Code section 70373 are affirmed.

The matter is remanded for another hearing for the limited purpose of the court to address and clarify the record and abstract of judgment as to the restitution and parole revocation fines, victim restitution, and defendant's credits, in accordance with the views set forth in this opinion.